COMMENTARY

Legal Foundations for a National Public Health Agency in Canada

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ABSTRACT

This commentary addresses some of the key legal challenges associated with establishing a national public health agency in Canada. These include issues related to privacy and confidentiality of personal health information in the public health context, constraints on the jurisdiction and powers of a national agency, the need to respect individual rights and freedoms in an outbreak situation, and international cooperation in infectious disease control.

The authors are part of a research initiative, comprised of experts in law, public health policy and medicine, that is currently analyzing legal considerations that may influence the mandate of a national public health agency in regard to infectious disease activities. This article discusses critical issues raised at a meeting in August 2004 that brought the research team together with key federal and provincial policy-makers and members of the public health community.

The commentary emphasizes that law sets the foundation for public health activities, and the promise of a national public health agency will only be realized if significant legal issues are examined early on to ensure the agency is built on a robust legal and policy framework.

MeSH terms: Jurisprudence; communicable disease control; organization and administration

La traduction du résumé se trouve à la fin de l'article.

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The 2003 outbreak of severe acute respiratory syndrome (SARS) served as an abrupt wake-up call for the urgent need to enhance public health preparedness in Canada, and the reports and recommendations issued in the wake of SARS serve as useful roadmaps for action.[1] The attention SARS generated has spurred a call to modernize public health infrastructure, renew intergovernmental relationships and enhance national leadership. Post-SARS (and even before SARS[2]), many commentators advocated the development of a national public health agency in Canada and, in turn, the federal government has proceeded to create such an agency, to be tasked with functions related to infectious and chronic diseases and emergency preparedness.

However, the reform of the Canadian public health system will create a variety of legal challenges. Indeed, though the SARS outbreak has generated both public and political will for reform, the current Canadian legal framework, including enduring issues associated with the federal-provincial division of powers and newer issues such as the proliferation of privacy laws across the country, will clearly impact how that reform unfolds. As enabling legislation for the Public Health Agency of Canada is currently being drafted, it is critical to address these legal realities.

In response to the SARS outbreak, the Canadian Institutes of Health Research issued a call for research proposals to investigate issues related to public health and health care system preparedness. With funding through this initiative, we have brought together a multi-centre team with interdisciplinary expertise in law, public health policy and medicine to identify and examine legal considerations that may influence the mandate and impinge on the activities of a national public health agency, particularly in regard to infectious disease surveillance and control and emergency response. On August 17, 2004, the research team convened a First Collaborators' Meeting with key federal and provincial policy-makers and members of the public health community.* In this

* Attendees were: Kirsten Almquist, Dennis Brodie, François Daigle, Paul Gully, Lina Labreche, Jean-François Luc, Vanessa E. Pearson and Frank Plummer (Health Canada); Brian Emerson (BC Ministry of Health); Jean Joly (Laboratoire de santé publique du Québec); Richard Masse (Quebec Institut de Santé Publique); and Elinor Wilson (Canadian Public

paper, we review some of the key issues addressed at the meeting.

Privacy and confidentiality

Public health initiatives, particularly in the context of infectious disease control, often generate a clash between individual rights and societal interests. Access to personal health information is a critical tool for effective surveillance activities, but this necessarily requires some intrusion on individual autonomy and privacy. Although our courts have had little opportunity yet to grapple with this conflict, there is no doubt Canadian laws will likely allow access to personal health information for the purpose of satisfying legitimate public health needs. In balancing competing interests, an Ontario court has noted that "although due consideration will be given to the privacy rights of individuals, the state objective of promoting public health for the safety of all will be given great weight."[3]

However, codifying protections for personal information has been a focal point of recent federal and provincial legislative activity. Many jurisdictions have enacted new privacy and health information legislation (e.g., the federal *Personal Information Protection and Electronic Documents Act* and specific health information protection laws in the three Prairie provinces and Ontario). To some degree, this legislative activity reflects strong public views about the privacy of health information.[4] Any erosion of health information protection, even in the context of a public health emergency, will need to carefully consider the legal and ethical principles and social concerns that underlie privacy rules.

While all recognize that protecting privacy is a laudable and necessary social goal, the growing number of statutes across the country that regulate collection, use and disclosure of personal information has introduced confusion about permissible (and mandatory) collection and sharing of data for public health purposes – particularly among various levels of government. One area of ambiguity is whether privacy laws take precedence over public health statutes or vice versa. Further, there are legislative inconsistencies across the country as to when information about infectious disease cases can be disclosed outside a province and to the federal government. During the SARS outbreak, we heard of "turf wars" over data sharing and constraints imposed by patient confidentiality rules.[1]

An effective and just public health system requires a degree of clarity about: the authority of national and provincial public health agencies in regard to health data collection and dissemination; when individual consent is and is not required for gathering, using and sharing personal health information; and, perhaps most importantly, the principles used to achieve an acceptable balance between privacy and surveillance. Ongoing efforts to harmonize health privacy protection in Canada could serve as a model for enhancing consistency among public health statutes as regards collection, use and disclosure of personal information.

Jurisdiction and powers of a federal agency

The constitutional division of powers between the federal and provincial levels of governments is an unavoidable legal reality[5] and despite general agreement about the value a national agency could serve, there are many unanswered questions regarding the specific activities it will undertake, the nature of the legal powers it will be able to use, and its relationship with other levels of government. A leading U.S. public health law expert has observed that "[s]ome of the most divisive disputes in public health are among the federal government, the states, and localities about which government has the power to intervene."[6] Regrettably, as the SARS outbreak revealed, intergovernmental conflict over public health jurisdiction arises in Canada, as well.

It is generally accepted that provincial governments have primary jurisdiction over matters related to health,[5] yet the imperatives of disease control, emergency preparedness and surveillance have national dimensions. The Supreme Court of Canada has observed that health is "an amorphous topic" and, "depending in the circumstances of each case on the nature and scope of the health problem in question", either federal or provincial governments may take action.[7] Sorting out jurisdictional issues will be a key task for the new Public Health Agency and its emphasis on building collaborative relationships with the provinces and territories may help sidestep legal wrangling that impedes reform.

Yet, as history has shown, jurisdictional conflicts can impede the development of even the most worthy social policy. Though there is currently a good deal of political will to develop a well-coordinated public health system, there is no guarantee a federal agency will always be looked upon with favour by provincial governments. As such, it seems axiomatic that the federal agency should ground its existence and main functions on an incontrovertible constitutional foundation.

Outbreak response

Law plays a key role in authorizing control measures during an outbreak situation, including screening, isolation, quarantine, treatment, and inspection and destruction of property.[8] Although such activities occur primarily at local and provincial levels, a national public health agency must also play a key role, particularly in implementing control measures at our borders. The federal government has taken a step in the right direction by passing an updated *Quarantine Act* to reflect a modern era of rapid, international disease transmission.* In introducing the revised legislation in the Canadian Parliament, the Minister of State for Public Health remarked that the statute was first drafted at "a time when automobiles and jetliners were the stuff of science fiction. Needless to say, times have changed. … Diseases do not respect borders, so we know that we will face repeated threats to public health in the future."[9]

However, to withstand legal scrutiny, control measures must be commensurate with the threat to the public's health. For example, the *Canadian Charter of Rights and Freedoms* offers various grounds on which an individual may challenge unfair

Health Association). Additional attendees affiliated with the research team were: Keri Gammon, Karen McEwan, Chris McLennan, Geoff Moysa and Lorraine Sheremeta. Members of the research team are listed on the first page of the article.

* Bill C-12, the revised Quarantine Act, received Royal Assent on May 13, 2005, but will not come into force until new regulations are drafted, likely sometime in 2006. See Public Health Agency of Canada News Release, "Update" (16 May 2005) online: <http://www.phac-aspc.gc.ca/media/nr-rp/2004/2004_54_e.html>.

or overbroad limitations on personal freedoms.[10] It is argued that "[i]n a democratic society, … coercive powers should be carefully justified"[11] and least restrictive measures that will achieve public health goals should be employed first.

International collaboration

Finally, we need to consider the conditions necessary for international cooperation. The rapid dissemination of accurate data is a vital component of an international response to infectious disease, but just as federal-provincial jurisdictional tension may hamper domestic information sharing, variation among national approaches to the reporting and control of diseases may make it equally difficult to develop a truly global system. At the international level, the World Health Organization (WHO) has recently revised its International Health Regulations, which have been described as "nonresponsive to the major challenges of emerging infectious diseases" and part of an "antiquated and structurally weak" global public health system.[12] The revisions, which were adopted in May 2005, seek to improve international surveillance and reporting, however, there are many issues left to resolve, including when reporting is required and whether the regulations will be legally binding.[13] Ideally, any reform of the Canadian public health system should be structured to facilitate international cooperation and be sensitive to a global approach to infectious disease control.

CONCLUSION

Various commentators, including all the reports stemming from SARS as well as the national Think Tank on the Future of Public Health in Canada,[14] have pointed to real or perceived legal constraints that impede the ability to respond effectively to public health threats. Without doubt, "[l]aw is an essential tool for public health. Law sets the structure within which public health officials, regulators and private citizens act to protect the population's health. Law can impede that process … or it can enhance it …."[15] The promise of a national public health agency will only be realized if relevant legal issues are examined early on to ensure the agency has a solid foundation upon which to build.

Our research aims to address these concerns and help fill the current gap in public health law research and resources in Canada. Additional information about the project, including access to discussion papers that analyze key legal issues we have highlighted here, will be available at www.law.ualberta.ca/centres/hli/project_summary.html.

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RÉSUMÉ

Ce commentaire porte sur certains des principaux défis juridiques associés à la création d'une agence nationale de santé publique au Canada : la protection des renseignements personnels et de la confidentialité des dossiers médicaux dans un contexte de santé publique, les contraintes liées aux compétences et aux pouvoirs d'une agence nationale, la nécessité de respecter les droits et libertés individuels en cas d'épidémie, et la coopération internationale dans la lutte contre les maladies infectieuses.

Les auteurs sont membres d'une équipe de recherche composée de spécialistes du droit, des politiques de santé publique et de la médecine, chargée d'analyser les aspects juridiques pouvant influer sur le mandat d'une agence nationale de santé publique dans sa lutte contre les maladies infectieuses. Le présent article examine les questions névralgiques qui ont été posées lors d'une réunion, en août 2004, entre les membres de l'équipe de recherche, des décideurs clés aux paliers fédéral et provincial et des intervenants en santé publique.

Le commentaire souligne que les activités de santé publique sont assujetties au cadre juridique, et qu'une agence nationale de santé publique ne peut donner sa pleine mesure que si l'on examine à l'avance les questions de droit importantes pour s'assurer que l'agence a des assises juridiques et politiques solides.